

EXHIBIT A

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No. 18-md-02843-VC-JSC

This document relates to:

ALL ACTIONS

**[PROPOSED] SUR-REPLY TO
DEFENDANT FACEBOOK, INC.'S REPLY
BRIEF IN SUPPORT OF ITS CLAIM OF
CONFIDENTIALITY**

Judge: Hon. Vince Chhabria and
Hon. Jacqueline Scott Corley
Courtroom: 4, 17th Floor

1 Plaintiffs file this sur-reply to Defendant Facebook, Inc.’s Reply Brief in Support of its
2 Claim of Confidentiality (Dkt. No. 681), to correct certain untrue statements.

3 **First**, Facebook incorrectly states that Plaintiffs seek relief: “it is *Plaintiffs* (not Facebook)
4 who raised this issue and required the parties and the Court to invest substantial resources over the
5 course of *nine months* to address it.” Dkt. No. 681 at 6; *see id.* at 1 (“Plaintiffs ask the Court to
6 rule . . .”); *id.* at 2 (Plaintiffs “ask the Court to reach the merits . . .”). It is Facebook, not Plaintiffs,
7 that filed a motion and that seeks relief. Facebook filed its motion because Plaintiffs filed a publicly
8 available document on September 28, 2020 after downloading it from the NBC News website. Dkt.
9 No. 526-3. Plaintiffs have not sought any relief. Their opposition brief simply asks the Court to
10 deny the relief sought by Facebook. Dkt. No. 660 at 1, 11.

11 **Second**, Facebook incorrectly states that Plaintiffs “ask the Court to reach the merits to
12 order Facebook to reproduce improperly leaked *documents*”—note the plural—“without
13 confidentiality stamping.” Dkt. No. 681 at 2 (emphasis added). It is Facebook, not Plaintiffs, that
14 put at issue more than the single publicly available document Plaintiffs downloaded from the NBC
15 News website and filed on September 28, 2020. And, because it was a publicly available copy that
16 Plaintiffs filed, rather than any document produced in discovery, the sole issue is whether that
17 publicly available copy should be permanently sealed.

18 Whether this dispute is about one document or 46 is confusing, and the confusion arises
19 from Facebook’s motion. Plaintiffs did write a letter to Facebook asking it to withdraw
20 confidentiality designations for 45 publicly available documents, copies of which Plaintiffs did *not*
21 file on the docket. Dkt. No. 660-1, ¶ 13; Dkt. No. 660-2. That letter, however, is not at issue. There
22 is only one document at issue, Dkt. No. 526-3. While a ruling on whether the Court should seal
23 that single publicly available document will inform whether other similar publicly available
24 documents must be filed under seal, Plaintiffs have only ever filed one such document in this action.

25 **Third**, Facebook suggests that Plaintiffs went searching for publicly available copies of
26 documents only after Facebook had produced them. It states: “*After* Facebook made these
27 productions”—*i.e.*, produced the Six4Three documents—“and *after* Plaintiffs became aware of the
28

1 Six4Three leak, Plaintiffs apparently scoured Facebook’s cloned productions for materials that had
 2 been part of Six4Three’s leak.” Dkt. No. 681 at 1 (emphases in original). That is untrue. Rather,
 3 the documents were published publicly and acquired by Plaintiffs more than four months *before*
 4 Facebook produced them:

- 5 • On November 6, 2019, NBC News published approximately 7,000 pages of
 6 documents obtained from the Six4Three litigation. Dkt. No. 660-1, ¶ 7.
- 7 • On November 19, 2019, Plaintiffs’ counsel downloaded the Six4Three documents
 8 from the NBC News Website. Dkt. No. 531-1, ¶ 3.¹
- 9 • On April 3, 2020, Facebook produced to Plaintiffs in this case a subset of the
 10 documents that had been published publicly by NBC News on November 6, 2019.
 11 Dkt. No. 660-1, ¶ 11.

12 ***Fourth***, Facebook states that “none of the articles Plaintiffs cite links directly to any of the
 13 documents they challenge.” Dkt. No. 681. That is false. The NBC News website links directly to
 14 the materials. Dkt. No. 660-1, ¶ 7. The single document at issue here is among them. A November
 15 6, 2019 Fox News article links to the NBC News URL containing the leaked documents. *See* Dkt.
 16 No. 660-1, ¶ 8. So, too, do articles published by Business Insider and Columbia Journalism Review

25 ¹ Paragraph 3 of the declaration at Dkt. No. 531-1 contains a typo stating that the documents had
 26 been downloaded from the NBC website “on November 19, 2020,” but the date the documents
 27 were downloaded was November 19, 2019. After all, the declaration at Dkt. No. 531-1 was filed
 28 October 5, 2020.

(see *id.*) and by Computer Weekly,² the New York Times,³ Firstpost,⁴ and Slate.⁵ This list comprises examples only and is not exhaustive.

Dated: June 1, 2021

Respectfully submitted,

KELLER ROHRBACK L.L.P.

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² Sebastian Kovig Skelton and Bill Goodwin, *Lawmakers study leaked Facebook documents made public today*, ComputerWeekly.com (Nov. 6, 2019), <https://www.computerweekly.com/news/252473540/Lawmakers-study-leaked-Facebook-documents-made-public-today>.

³ Cecilia Kang and David McCabe, *California Sues Facebook for Documents in Privacy Litigation*, NY Times (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/technology/facebook-california-investigation.html>.

⁴ *FACEBOOK USED USER DATA AS A WEAPON AGAINST RIVALS, OFFERED IT UP AS A SOP TO FRIENDS: REPORT*, Firstpost (Nov. 7, 2019), <https://www.firstpost.com/tech/news-analysis/facebook-reported-misuse-of-user-data-revealed-in-leaked-documents-have-been-published-7612931.html>.

⁵ Elena Botella, *Facebook Earns \$132.80 From Your Data per Year*, Slate (Nov. 15, 2019), <https://slate.com/technology/2019/11/facebook-six4three-pikinis-lawsuit-emails-data.html>.

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Lesley E. Weaver, attest that concurrence in the filing of this document has been obtained from the other signatories. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of June, 2021, at Oakland, California.

/s/ Lesley E. Weaver

Lesley E. Weaver

CERTIFICATE OF SERVICE

I, Lesley E. Weaver, hereby certify that on June 1, 2021, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Lesley E. Weaver

Lesley E. Weaver